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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 459

ANTHONY LOPIPARO,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 29, 1954.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in Appendix B, infra, pp. 15-26.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 29, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

QUESTIONS PRESENTED.[1]

1. Whether petitioner, a corporation president, called as a federal grand jury witness, may be committed for contempt for not producing corporate books after testifying that he is not the custodian of the books, that he does not know their location, and that he has unsuccessfully endeavored to find them, in the absence of any evidence to indicate that petitioner is swearing falsely.

2. Whether the fact that petitioner was peculiarly vulnerable to self-incrimination, that the grand jury itself was investigating him, that a state charge had been lodged against him and the other corporate officers nine months previously, that all the property of the corporation was seized under an attachment, are matters bearing on his explanation for non-production of the records and his inability to produce them.

3. Whether the disregard of the procedural safeguards of proper notice and time to prepare a defense, provided by Rule 42 of the Federal Rules of Criminal Procedure, was appropriate in the absence of any emergency.

STATUTE AND RULE INVOLVED.

The pertinent statute and rule are printed in Appendix A, infra, p. 13.

STATEMENT.

Petitioner, after appearing under a subpoena to testify before a grand jury on May 18, 1954, was directed by Mr. Max Goldschein, special assistant to the Attorney General, to bring before the grand jury on May 19, 1954, the books of the Twin City Distributing Company (R. 1). After

[1] The question of the excessiveness of the sentence is also in this case.

petitioner returned without the books and claimed his privilege against self incrimination, he was brought before the District Court which ruled that he had no privilege with respect to corporate books (R. 2). Petitioner then told the court that although he had endeavored to locate the books the night before he could not find them as he did not know who had them. The court thereupon directed him to produce the books before the grand jury the next morning (R. 6-7).

The next morning, May 20, petitioner's counsel informed the court that his client had been unable to find the books although he had contacted the auditor and bookkeeper of the company as well as its other officers. Counsel also informed the court that petitioner had never been the custodian of the books and had not seen them for nine months (R. 8). After government counsel suggested that petitioner should testify to those facts, the court directed him to take the witness stand (R. 9). Petitioner testified that he had on the preceding day visited the company's auditor and bookkeeper and had inquired as to where the books were, but that they also did not know of their whereabouts (R. 9-10). He also contacted the other officers of the corporation who told him that they had no knowledge of the location of the books (R. 10). On cross-examination he admitted he was the president of the corporation, that he did not have its books, that the books had been in the office about 9 or 10 months previously and that the last time he had been in the office was when the "city put the padlock" on the company (R. 12). When asked whether he owned 48% of its stock and whether he had signed the corporate tax return he claimed his constitutional privilege (R. 12). The government insisted that by taking the stand to testify he had waived his privilege (R. 13-16). The court ruled that since it had ordered the witness to the stand it would strike out all testimony up to that point (R. 16). The government rested its case after in-

troducing the corporate tax return filed on May 27, 1953, which return listed petitioner as president and owner of 48% of the stock, the vice-president as owner of approximately 29% and the secretary as owner of 22% (R. 17).

Petitioner's counsel then requested time to produce witnesses to show that petitioner had never been the custodian of the records, that it was physically impossible for him to obtain or produce the books, and that he had endeavored to locate them pursuant to the court's prior order. The court, however, stated that the matter was going to be heard at once (R. 18). The government urged the court to commit petitioner to jail for criminal contempt (R. 19). Petitioner then called as a witness the company's auditor who testified that on the preceding evening petitioner called to ask him and his wife, the bookkeeper, whether they knew where the books were, and that they told him that they had not seen them since returning them to the company office in September, 1953 (R. 19-20). The court then ordered petitioner to produce the journal and general ledger of the company before the grand jury at 2 o'clock that afternoon, May 20. When counsel asked if petitioner was to appear in the grand jury room or in the courtroom the court replied: "In the grand jury room, and if he does not he will be down here very soon. We will take care of him" (R. 21).

The next morning, May 21, government counsel read to the court the transcript of what had occurred before the grand jury on the previous afternoon (R. 22). Petitioner testified before the grand jury that he could not locate the books although he tried to find them, that he had sought them from the other officers, whose address and phone number were furnished to the jury. He stated that his attorney had questioned the sheriff who had padlocked the office of the corporation in September, 1953 (R. 24), and that the last time he had seen the books in the office was in September, when he was arrested by the

police and brought to police headquarters; that when he returned to the company's office the sheriff would not let him enter because the corporation had been attached, after it and its officers were charged with having counterfeit cigarette stamps (R. 25, 27-28). He also stated that he did not know if the books were in the office the last time he was there as he had not looked for them (R. 25-26).

He was asked whether or not he had been at the Twin City Distributing Company since the time of the attachment and whether the books were in the company office after the sheriff attached the place. He was also asked "where were the books taken out of the Twin City Distributing Company or were the books taken out of the Twin City Distributing Company after the sheriff attached the place." The appellant claimed his constitutional privilege as to these questions. He also asserted his privilege with regard to a question as to whether he took the books out of the company, whether he sold any of the equipment of the company, and whether he signed the income tax return of the company (R. 24, 26, 28, 29).

After the reading of this testimony to the court petitioner requested leave to offer testimony of witnesses, and he offered to prove that after a writ of attachment was issued against the Twin City Company in September, 1953, the sheriff under the writ went to the office, took possession of everything there and placed the same in storage. After being directed by the court to find out what the sheriff's testimony would be concerning the books, counsel reported that the sheriff had given him a list of articles including a safe, which had been seized under the attachment. Government counsel then stated that the safe had only a six inch opening and that it would be impossible to place books in there (R. 30-36). Petitioner also offered to prove by police officers that on September 11, 1953, they arrested petitioner along with others of the Twin City Company in a surprise arrest, that the persons arrested

had no knowledge that they were to be arrested, and that they were immediately taken down to police headquarters. He further offered to prove that after the arrest a writ of attachment was levied against the Twin City Distributing Company, that a deputy sheriff was placed inside the company office, and that he did not let petitioner or any other individuals connected with the company enter its offices (R. 30-33). Counsel also offered to prove that petitioner was reputed to be a gangster, that the grand jury was then investigating his activities and that being a potential defendant he could not take the stand and show good faith in not producing the books without waiving his privilege against self incrimination (R. 34). Petitioner further requested additional time in order to determine whether the Bureau of Internal Revenue, which he believed to be investigating the Twin City Distributing Company, had possession of the records or copies of the records (R. 35).[2]

The court denied petitioner's offer of proof when his counsel was unable to state that any of the witnesses knew the location of the books (R. 36). Mr. Goldschein, government counsel, urged the court to impose a sentence finding the petitioner guilty of criminal contempt. The court thereupon found that petitioner had wilfully disobeyed the order of the court in refusing in his capacity as president to produce the books of the corporation and that he was guilty of criminal contempt (R. 37). The court ordered petitioner committed to the custody of the United States marshal "for imprisonment for a period of 18 months or until the further order of this court should he produce before the grand jury the aforesaid records before the expiration of said sentence or the discharge of said grand jury" (R. 37, 39-40).

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[2] Petitioner, the other two officers and the Twin City Distributing Company have been since indicted in the United States District Court for the Eastern District of Missouri by this very grand jury for evading 1953 corporate income tax.

The court below in a 2-1 decision (Appendix B) affirmed the conviction holding that the fact that petitioner was the president, warranted the conclusion that he had either control of the books or that he could furnish some convincing explanation of his inability to produce them. The court further held that the district court was not compelled to believe the testimony of petitioner that he was unable to find the books and that petitioner should have produced the other officers to substantiate his claim as to the unavailability of the books. The court further found that the fact that petitioner was peculiarly vulnerable to the self incrimination, that the grand jury was investigating him and his company, that he was arrested and the company attached, were facts of no legal materiality. The court concluded that the procedure followed was appropriate to the situation and said that there was no showing that if petitioner was given further time he could prove that he was unable to produce the books.

The dissenting opinion concluded that petitioner was justified in not voluntarily offering himself as a witness because he had a justifiable fear against self incrimination. The opinion also stated that petitioner was not charged with perjury but with failing to produce corporate books and concluded:

> "He was convicted without one scintilla of direct evidence that he actually had the books and records of the corporation. The presumption, inference, or implication arising from proof that a corporate president who actually had charge of a corporation's books could be presumed to still have them, see **Wilson v. United States**, 221 U. S. 361, was applied to defendant here without any proof that he had ever had control of the books. That inference, aided by inferences drawn from the defendant standing upon his constitutional right and declining upon those grounds to

answer questions, is said to be adequate proof to sustain his conviction. Be he 'hoodlum' or not, I do not agree."

REASONS FOR GRANTING THE WRIT.

1. The decision below erroneously applies **United States v. Bryan**, 339 U. S. 323, 330-332, which holds that a witness charged with contempt makes a complete defense by proving that he is unable to comply, as petitioner showed both before the grand jury and before the district court that he was unable to comply with the direction to produce the corporate books and records. Petitioner was not charged with perjury but the court in finding him guilty of contempt necessarily disbelieved his testimony both before the court and the grand jury. Cf. **In re Michaels**, 326 U. S. 224. He was convicted without any direct evidence that he actually had the records and without any evidence that the records had ever been under his control. The government failed to sustain its burden of proof, but rather rested its case on the inference that a corporate president is presumed to have its records, and that an inference can be drawn from petitioner's refusal on constitutional grounds to answer certain questions. Moreover, these proceedings were characterized by the district court and by the government on appeal as criminal contempt. However, the opinion below overlooks the fact that in criminal contempt cases the burden of proving defendant's guilt is upon the government and that the presumption of innocence operates until overcome by proof beyond a reasonable doubt. **United States v. Fleishman**, 339 U. S. 349, 363.

Petitioner's position in the instant case is similar to that of the directors in **Wilson v. United States**, 221 U. S. 361, who were not held to be in contempt although they could not produce corporate records because they stated they had made efforts to obtain the books for production

before the grand jury but that Wilson had declined to surrender them. Petitioner's solicitude to comply with the court's order showed the "modicum of good faith" required by **United States v. Bryan,** supra. Even if petitioner had been able to call as witnesses the other corporate officers, the court would have apparently still denied his offer of proof since petitioner could not inform the court that the other officers had the records. They were in the same position as the sheriff and the police, whose evidence the court refused to hear because petitioner's counsel could not state that they had the books and records. Lack of notice as to the nature of the proceedings handicapped petitioner in this respect.

It is true that petitioner, after giving an explanation and testifying concerning the books and records, later asserted the privilege against self-incrimination as to whether or not he had been at the company office after the attachment, whether these books were in the company office when the sheriff attached the place (R. 28), and whether the books were taken out of the company after the attachment (R. 29). The government did not make any issue as to whether this refusal was properly or improperly claimed and therefore was in no position to claim that petitioner should have given further explanation as to the location of the books, for if it was not satisfied with the explanation an issue should have been raised as to his claim of privilege. The court below in concluding that petitioner's defense lacked good faith must have concluded that these questions should have been answered. No inference should be drawn from petitioner's failure to answer certain questions before the grand jury as a defendant facing criminal contempt may not be compelled to be a witness against himself. **United States v. Fleishman,** supra.

Petitioner was placed in a dilemma since when he tried to explain his position by testifying in open court the government claimed he was waiving his privilege against

self-incrimination (R. 13-16). A witness reputed to be of bad repute and under investigation by the very grand jury should not be placed in the dilemma of either waiving his privilege against self-incrimination or falling short of an explanation concerning the non-production of corporate records. A lay witness under investigation cannot be expected to nicely gauge the difference between questions ancillary to the production of corporate books and questions to which he can properly assert his privilege.

This case, moreover, conflicts with **Healey v. United States**, 9 Cir., 186 F. 2d 164, where a witness who testified that she did not know of the existence of records was held to have given a sufficient explanation for their nonproduction.

The court had nothing before it on which to base its conclusion that petitioner had knowledge of the present location of the records. The government had introduced no evidence to overcome his presumption of innocence. The only evidence in the record was that petitioner did not have such knowledge. And even if the conviction was based on circumstantial evidence the circumstances were not inconsistent with any reasonable hypothesis of innocence.

2. The procedural aspects of this case were also prejudicial to petitioner. Rule 42 of the Federal Rules of Criminal Procedure governs procedural aspects of criminal contempt. Rule 42 (a) authorizes a summary punishment if the contempt was committed in the actual presence of the court. The government below argued that a contempt occurred in the actual presence of the Court and that Rule 42 (a) was applicable. However, only a blanket defiance to do an act in open court would amount to such an act as to authorize summary punishment under Rule 42 (a). Cf. **Carlson v. United States**, 1 Cir., 209 F. 2d 209. Summary punishment is permissible only where the taking of

evidence is not required. As the court was required to hear evidence as to what occurred before the grand jury, the procedure under Rule 42 (a) was not applicable. Nor was there compliance with the notice and reasonable preparation time requirements of Rule 42 (b). The court never did state that it was entertaining any motion to cite petitioner for contempt. The statement by the court that he would take care of petitioner "if he does not" is not such a statement as would accurately put petitioner on notice as to the nature of the proceedings. Petitioner was not told that if he did not find the books and records the court would punish him for criminal contempt. He was not told to have any witnesses available to explain the non-production of the books and records.

Petitioner did not have sufficient time to prepare a defense. He had to limit his offer of proof because of this lack of time (R. 35). Failure to give proper notice was a factor which interfered with his defense. And as he did not know what issue he was to meet he did not know what witnesses should be available or what investigation should be made. Under these circumstances we do not think that the court complied with either Rule 42 (a) or (b). Moreover, to hold that there was compliance with Rule 42 would nullify the reasons for the adoption of this rule, which was designed "to insure the realization by contemnors that a prosecution for criminal contempt is contemplated." **United States v. United Mine Workers of America,** 330 U. S. 258, 297-298. Here the rule is being frustrated as the question of the nature and character of the proceedings is being determined at the very end in appellate review rather than at its beginning. Nor was there any emergency such as the tolling of the statute of limitations warranting the disregard of the rule.

The peculiar vulnerability of petitioner to self-incrimination is material to his claim of privilege and has a bearing

on the issue of good faith. The grand jury investigation of the company is a circumstance to be considered in determining whether or not the other officers destroyed or hid the records. The arrest and attachment by the sheriff is a circumstance showing possible loss or destruction of the records. Petitioner was even denied the right to discover if the Bureau of Internal Revenue had made copies of the records.

3. The Court's concern with the fair administration of justice warrants the granting of certiorari in this case. Petitioner was punished without the formalities required by the Bill of Rights in this contempt proceeding. If the Government considered petitioner's testimony relative to the location of the books to be false, a prosecution for perjury rather than contempt should have been instituted. See **Ex parte Hudgings**, 249 U. S. 378; **In re Michael**, 326 U. S. 224. The Court below did not exercise sufficient self-restraint in using the summary power for punishing contempt nor did it use "the least possible power adequate to the end proposed." See **Anderson v. Dunn**, 6 Wheat. 204, 231, 5 L. Ed. 242. The questions presented are similar to those in **Howard v. United States**, 8 Cir., 182 F. 2d 902, which this Court thought to be of sufficient importance to grant certiorari. 340 U. S. 898. The judgment in that case was vacated and the cause dismissed because of mootness.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY M. GLAZER,
408 Olive Street,
St. Louis, Missouri,
Counsel for Petitioner.

APPENDIX A.

18 U. S. C. A.:

Sec. 401. **Power of court.**

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

F. R. Crim. P.:

Rule 42. **Criminal Contempt—**

(a) **Summary Disposition.** A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defend-

ant or, on application of the United States Attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

No. 15,089.

Anthony Lopiparo, Appellant, vs. United States of America, Appellee.	}	Appeal from the United States District Court for the Eastern District of Missouri.

[October 29, 1954.]

Sidney M. Glazer (Godfrey P. Padberg was with him on the brief), for Appellant.

Max H. Goldschein, Special Assistant to the Attorney General (William K. Stanard II, Assistant United States Attorney, was on the brief), for Appellee.

Before Sanborn, Johnsen and Collet, Circuit Judges.

Sanborn, Circuit Judge.

This is an appeal from a judgment and order of the District Court committing the appellant, Anthony Lopiparo, for contempt for refusing to comply with an order of the court requiring him, as President of the Twin City Distributing Company, a corporation, of St. Louis, Missouri, to produce before the Grand Jury certain books of that Company.

On May 19, 1954, the appellant, with his counsel, was before the court in the presence of the Grand Jury. Counsel for the Government advised the court that the appellant, a witness who appeared before the Grand Jury under sub-

poena, had, on the day before, been asked, as President of the Twin City Distributing Company, to bring before the Grand Jury the books of the Company, that the appellant claimed his privilege against self-incrimination; that he was then directed to bring the books and have his counsel with him before the Grand Jury on the morning of May 19, 1954; that he was before the Grand Jury on that morning, and upon being asked whether he had brought the books for the year 1953 with him, claimed his privilege and refused to answer any questions about the Company's books. The hearing before the court was, on request of appellant's counsel, continued until 2:00 P. M. At that time appellant's counsel asked for more time to show his client's background and that he was reputed to be "a hoodlum, a gangster of renowned reputation," with a long criminal record.

Counsel for the Government stated that, if true, those facts would present no legal reason for not producing the Company's records; that all the Grand Jury was asking for was these records; and that appellant "can either bring the books before the Grand Jury or show the Grand Jury that he does not have the books and can't comply." Upon being questioned by the court, the appellant stated that he had not produced the books, as requested by the Grand Jury, because he did not know who had them. The court directed him to have the books before the Grand Jury at 10:00 o'clock on May 20, without fail.

The appellant, with his counsel, was again brought before the court at 10:00 o'clock on the morning of May 20. Appellant's counsel stated what his client had told him about having attempted to locate the books without success. The court directed the appellant to take the witness stand. At the conclusion of the appellant's testimony relative to his efforts to locate the books and as to other matters, the court, on its own motion and without objection from counsel, ordered all of the testimony stricken on the

ground that the court's action in directing the appellant to take the stand might be regarded as coercive and prejudicial to his rights.

Counsel for appellant then stated to the court that he had only one witness present, that he had not been able to subpoena others, and that he would like additional time. Counsel for the Government stated that the Grand Jury was waiting and that he would like to continue "as far as we can go."

The Government produced evidence to the effect that the appellant was President of the Twin City Distributing Company and owned 48.7% of its common stock; that Anthony Giondono was Vice-President and owned 29.2% of its stock; and that Ralph Caleca was Secretary-Treasurer and held 22.1% of the stock. Counsel for the appellant asked for additional time to show that it was physically impossible for the appellant to produce the books. Counsel for the Government stated that the appellant had had three days to bring in the books, and that his failure to comply with the court's order was a deliberate defiance of that order. Government counsel urged that the appellant be committed for contempt.

The appellant then produced as a witness Andrew Devoti, who testified that he was a public accountant and that in 1953 his wife worked three days a week for the Twin City Distributing Company; that appellant came to his home the night of May 19, 1954, and asked both him and his wife if they knew where the books of the Company were, and that they told him they did not know; that he (Devoti) did not know where the books were; that when they (the Devotis) were through with the books they brought them back to the Company's office; that he personally left them there; and that the last time he brought them back was, he believed, about the first week in September, 1953, in the nighttime.

The Court then stated that it would give the appellant one further chance to comply with the order of the court, and allowed him until 2:00 o'clock that afternoon (May 20, 1954) to produce the journal and general ledger of the Company of which he was the President, and ordered him to have them at that time. Appellant's counsel then said, "In the Grand Jury room or down here, Your Honor?" The court replied: "In the Grand Jury room, and if he does not he will be down here very soon. We will take care of him."

At 3:50 P. M. on May 20 the court was advised that the appellant had again appeared before the Grand Jury, but had not produced the books as ordered by the court. At the request of Government counsel, further hearing was postponed until May 21 at 10:00 o'clock. At that time and in the presence of the Grand Jury, counsel for the Government read to the court the questions asked of the appellant before the Grand Jury on the afternoon of May 20 and his answers. The appellant had testified that he had "tried every which way to find them books"; that he could not locate them; that he had asked his auditor and the girl who worked in the office if they knew where the books were, and had talked to Mr. Giondono, the Vice-President, and Mr. Caleca, the Secretary-Treasurer, of the Company; that none of them knew where the books were; that the Sheriff who had padlocked the office might have taken the files. He also testified that it could have been nine to ten months since he saw the books; that it might have been in September, 1953; that he believed "that is when they arrested us, put a padlock on"; that on the last occasion he was in the office he did not look to see if the books were there. When asked who was in charge of the office when he left and when he was absent, he claimed his privilege against self-incrimination. He testified that the Sheriff had taken possession of the office under an attachment, because it was

said the Twin City Distributing Company was "charged with having counterfeit cigarette stamps."

We quote the following questions and the appellant's replies before the Grand Jury on the direct examination by counsel for the Government:

"Have you been in the Twin City Distributing Company office since that time [the time when the Sheriff of the City of St. Louis attached the office]?

"I stand on my constitutional right on the ground it may tend to incriminate me.

"It will incriminate you to tell the Grand Jury whether or not you were in the offices of the Twin City Distributing Company after the sheriff attached the place?

"I stand on my constitutional right on the grounds it may tend to incriminate me.

"Were the books in the office of the Twin City Distributing Company after the sheriff attached the place?

"I stand on my constitutional rights on the ground it may tend to incriminate me.

"Where were the books taken out of the Twin City Distributing Company or were the books taken out of the Twin City Distributing Company after the sheriff attached the place, Mr. Lopiparo?

"I stand on my constitutional rights on the ground it may tend to incriminate me.

* * * * * * *

"Were the books taken out after?

"I stand on my constitutional rights on the ground it may tend to incriminate me.

"Mr. Lopiparo, how long did the sheriff have an attachment on Twin City Distributing Company, approximately, can you tell us?

"No, I don't know.

"About how long?

"I don't know.

"Did you sell any of the equipment of the Twin City Distributing Company?

"I stand on my constitutional rights on the ground it may tend to incriminate me.

"Did you take the books out of the Twin City Distributing Company?

"I stand on my constitutional rights on the ground it might tend to incriminate me."

Following the reading of the questions asked the appellant and the answers given by him before the Grand Jury, counsel for the appellant stated that he had some witnesses present. The court asked if the witnesses would tell where the books were. Counsel stated that he did not know; that he had present the Clerk of the Circuit Court of the City of St. Louis, who would testify that an attachment was issued and delivered to the Sheriff of the City of St. Louis, who was also present in the court room; and that he (counsel) would like to have the Sheriff take the stand to show that, under the writ of attachment, he went out to Twin City Distributing Company and took everything in possession and stored it. The court asked whether the Sheriff would testify that he had the books. Counsel stated that he had never asked him. The court told counsel to find out what the Sheriff would testify, and to make an offer of proof. After consulting with the Sheriff, counsel stated that the Sheriff had given him a list of the articles taken under the writ of attachment. The court stated that it was not interested in what articles were taken under the writ of attachment, but wanted to know where the books were.

Counsel for the appellant then made an offer to prove by police officers and a deputy sheriff that on September 11, 1953, the appellant and others connected with the Twin City Distributing Company were arrested and taken to the police department, and that, at the time of their release shortly thereafter, they were not permitted to enter the

office of the Company, which was then in the possession of the Sheriff. Counsel also offered to prove that the appellant was reputed to be a gangster and a notorious underworld character and had been interrogated by the "Kefauver Committee" investigating organized crime in interstate commerce.

When asked by the court as to what materiality the appellant's background had with respect to production of the corporate books, counsel stated that what he was trying to show was "that with his background and his general reputation that he can't take the stand and show in good faith he attempted to get the records, and he does not have the physical ability to comply with the court's order, because if he did that he would be waiving his privilege under the Fifth Amendment of the Constitution of the United States, that is what that offer of proof would be for, your Honor; * * *." The court rejected the offer of proof.

In conclusion, counsel for appellant said:

"* * * I would just like to clear up one thing. I am in total agreement with Mr. Goldschein [counsel for the Government] that these records, the Grand Jury has the right to have them available before them. I would like to state I am bringing out his [appellant's] record to show he can't take the stand because he would be waiving the Fifth Amendment, that the Grand Jury are entitled to have them as such, but I can't show good faith on his part to comply with the order."

The court found that the appellant had willfully and deliberately disobeyed the order of the court by refusing, as President of the Twin City Distributing Company, to bring before the Grand Jury the journal and general ledger of the Company, and was guilty of contempt. The court ordered the appellant committed to the custody of the

United States Marshal "for imprisonment for a period of eighteen months, or until the further order of this court should he produce before the Grand Jury the aforesaid records before the expiration of said sentence, or the discharge of said Grand Jury."

The appellant concedes that a corporate officer may be compelled to produce corporate records, although they incriminate him. **Wilson v. United States**, 221 U. S. 361. He also concedes that the record shows that the appellant is the President of the Twin City Distributing Company and the owner of some 48% of its common stock.

The appellant contends, however: (1) that the evidence was insufficient to sustain the court's judgment and order; (2) that the appellant was not given proper notice of the charge and a reasonable time for the preparation of his defense; and (3) that the court erred in excluding evidence relative to (a) the attachment by the Sheriff and appellant's arrest, (b) the reputation of appellant, and (c) the investigation of appellant by the Grand Jury.

The fact that the appellant was the President of the Twin City Distributing Company justified the court in concluding that he had control of the books of the Company or could obtain them or could furnish some reasonable and convincing explanation of their whereabouts or of his inability to produce them if they were in fact not available to him. See **Wilson v. United States**, supra, page 385 of 221 U. S.

The District Court did not believe and was not compelled to believe the testimony of the appellant that he was unable to find the books he was ordered to produce. The court was the judge of the appellant's credibility and the weight of his evidence. The appellant's self-interest was obvious. His defense was one easily fabricated and almost impossible to disprove. Although the other corporate offi-

cers of the Company were, according to his own testimony, accessible to him, he failed to produce them to substantiate his claim as to the unavailability of the books. We think that the evidence was sufficient to sustain the contempt order.

In **United States v. Bryan**, 339 U. S. 323, 330-332, the Supreme Court said:

"Ordinarily, one charged with contempt of court for failure to comply with a court order makes a complete defense by proving that he is unable to comply. A court will not imprison a witness for failure to produce documents which he does not have, unless he is responsible for their unavailability, cf. **Jurney v. MacCracken**, supra [294 U. S. 125], or is impeding justice by not explaining what happened to them, **United States v. Goldstein**, 105 F. 2d 150 (1939).

"On the other hand persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, e. g., **Blair v. United States**, 250 U. S. 273, 281 (1919); **Blackmer v. United States**, 284 U. S. 421, 438 (1932).

* * * * * * *

"* * * Testimonial compulsion is an intensely practical matter. If, therefore, a witness seeks to excuse a default

on grounds of inability to comply with the subpoena, we think the defense must fail in the absence of even a modicum of good faith in responding to the subpoena."

The appellant in the instant case did not **prove** that he was unable to comply with the court's order, and his defense for noncompliance, we think, lacked a "modicum of good faith."

There was, in our opinion, no error committed by the court in rejecting the appellant's offers of proof. That the appellant was peculiarly vulnerable to self-incrimination, had no legal materiality, we think, so far as the question of his failure to produce the books of his Company was concerned, nor had the fact that he had been arrested and the office of his Company attached in September of 1953. Whether the Grand Jury was investigating him or his Company was a matter of no consequence with respect to his failure to comply with the order of the court.

The procedure followed by the District Court was not inappropriate. The situation called for prompt action on the part of the court in aid of its Grand Jury. The appellant was advised from the beginning that he must produce the books or prove by convincing evidence his inability to produce them, and that if he failed or refused he would be subject to commitment for contempt. The proceedings leading to his commitment were had in the presence of the court and the Grand Jury. There was no showing that if given additional time the appellant could or would procure and produce the books or prove that he was unable to produce them. His counsel virtually conceded that the appellant could not show a good faith effort to comply with the court's order to produce. That a corporate officer who unjustifiably refuses to produce corporate books and records which he has been ordered to produce may be committed for contempt is not subject to question. **Wilson v. United States**, supra, page 376 of 221 U. S.

The punishment imposed upon the appellant was not, we think, excessive.

The judgment and order appealed from is affirmed.

Collet, Circuit Judge, dissenting.

Defendant was the illiterate president of some kind of a corporation. He could neither read nor write. He had never been in charge of the books of the corporation, had never kept the books nor had any control over them other than constructive, as the president of the corporation. In laymen's language, he was being hotly pursued by the "Law", federal, state, and congressional. Some kind of a charge had been lodged against the corporation by the state authorities for using counterfeit cigarette tax stamps. In September, 1953, he and others connected with the corporate business were arrested by the city police and taken to the police station. They were held there for a short time and returned to the place of arrest. When they arrived there they found that, by coincidence or otherwise, during their absence the sheriff's office had padlocked the corporate place of business and taken possession of all of its contents.

The following May, defendant was summoned before the federal grand jury and asked to produce the corporate books and records. He stood on his constitutional rights. Upon being advised that his personal constitutional rights did not extend to the production of corporate books and records, he testified that he did not have them, did not know where they were, had never kept them, and they had never been under his control, but that he would try to find them. He testified that he tried to find them. He produced a witness who testified that the last time they were seen to the witness' knowledge was shortly before the raid by the sheriff's office in September, 1953, when they were placed in

the office of the corporation. Defendant steadfastly insisted that he did not have them, that he was afraid to offer himself as a witness for fear of waiving his constitutional rights. He had some justification for that fear. That is exactly what government counsel contended before the court, after the court had called him as a witness. The court very properly struck the evidence that was produced in response to the court's direction that he take the witness stand, in order to eliminate any possible element of coercion. But that left him in the situation where if he voluntarily offered himself as a witness, government counsel would have been able to contend that he was subject to broad cross-examination.

Defendant was charged, not with perjury, not with failure to answer proper questions propounded to him by the grand jury, but with failing to produce the books of the corporation. The court denominated the proceedings as criminal contempt proceedings. Counsel for the government so characterizes the proceedings. He was convicted without one scintilla of direct evidence that he actually had the books and records of the corporation. The presumption, inference, or implication arising from proof that a corporate president who actually had charge of the corporate books could be presumed to still have them, see **Wilson v. United States**, 221 U. S. 361, was applied to defendant here without any proof that he had ever had control of the books. That inference, aided by inferences drawn from the defendant standing upon his constitutional right and declining upon those grounds to answer questions, is said to be adequate proof to sustain his conviction. Be he "hoodlum" or not, I do not agree.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 459

ANTHONY LOPIPARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15) is reported at 216 F. 2d 87.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1954, and the petition for a writ of certiorari was filed on November 23, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the trial court's finding of contempt.

2. Whether petitioner was afforded a proper hearing with notice of the charges against him within the requirements of Rule 42 of the Federal Rules of Criminal Procedure.

STATUTE AND RULE INVOLVED

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42, Federal Rules of Criminal Procedure provides:

> Rule 42. Criminal Contempt—
>
> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

In the United States District Court for the Eastern District of Missouri petitioner was adjudged guilty (by the court) of contempt for refusal to comply with the court's order requiring him to produce before the Grand Jury certain books of a corporation of which he was president (R. 37, 39, 40). Under 18 U.S.C. 401 he was sentenced to imprisonment for 18 months, "or until the further order of this Court should he produce before the

Grand Jury the aforesaid records before the expiration of said sentence, or the discharge of said Grand Jury" (R. 39, 40). On appeal his conviction was affirmed, one judge dissenting.

The record may be summarized as follows:

Petitioner with counsel was before the court in the presence of the Grand Jury on May 19, 1954 (R. 1). Government counsel advised the court that petitioner had on the day before been instructed, as President of the Twin City Distributing Company, to bring before the Grand Jury on May 19th the books of the company; that petitioner claimed the privilege against self-incrimination; that he was then told again to bring his books, consult with counsel and have his counsel with him on May 19th; that he was before the Grand Jury on that morning, and upon being asked whether he had brought the books with him he claimed the privilege and refused to answer any question about books (R. 1). On request of petitioner's counsel the hearing before the court was continued until 2:00 P.M. At that time petitioner's counsel asked for more time to show his client's "background and setting under which this witness is testifying before the Grand Jury", specifically, that petitioner was allegedly "a hoodlum, a gangster of renowned reputation, that he has a long criminal record, and that there is a report by the Kefauver Committee about Mr. Lopiparo" (R. 2, 3). Counsel for the government insisted that, if true, these facts would present no legal reason for not producing the corporate books; that all that the Grand Jury was seeking was the

books; and that petitioner "can either bring the books before the Grand Jury or show the Grand Jury that he does not have the books and can't comply" (R. 3, 5). The court reminded petitioner's counsel that there is no immunity for the books of a corporation (R. 5). Government counsel then asked the court to direct petitioner to get the journal and ledger sheets (R. 6). The court ordered petitioner to produce them before the Grand Jury at 10 o'clock the next morning (R. 7).

When petitioner was again brought before the court on the following morning, his counsel related what his client had told him about having unsuccessfully made an effort to locate the books (R. 8). Government counsel objected to counsel testifying for his client and the court ordered petitioner to the stand (R. 9). Petitioner, in response to his counsel's questions, stated that he had contacted his accountant and the secretary of the corporation and one Giondono (later identified as vice-president, R. 17); that they all told him that they did not know the location of the books (R. 9, 10). Petitioner was questioned on cross-examination concerning his signing the company's income tax forms (R. 11). After consulting with counsel, petitioner refused to answer on self-incrimination grounds (R. 12, 13). The government appealed to the court to rule that he had waived the privilege on taking the stand and that it was necessary to cross-examine petitioner to show that he had custody and control of the books and operated the organization (R. 13). The court, stating that it wished

to avoid any suggestion of coercion of the witness, of its own motion struck all his testimony, allowing him to "start afresh" and determine his course anew under advice of counsel (R. 16).

Petitioner's counsel informed the court that he had only one witness present, that he had been unable to subpoena others and that he would like additional time (R. 17). Counsel for the government stated that the Grand Jury was waiting and that he would like to continue "as far as we can go" (R. 17).

The government then showed by the corporation's income tax return, filed May 27, 1953, that petitioner was president of Twin City Distributing Company and owned 48.7% of its common stock; that Anthony Giondono was vice-president and owned 29.2%; and that Ralph Caleca was secretary-treasurer and owned 22.1%; the entire corporate stock was thus owned by these three officers (R. 17). Petitioner's counsel asked for more time to show physical impossibility on petitioner's part to produce the books (R. 18) and argued that "the Government has not shown that Mr. Lopiparo is the custodian of those records, that he has the physical ability to produce the records" (R. 19). The government urged that he had already had three days and that he should be committed for contempt (R. 18). The court announced a five minute recess, at the end of which the matter would be disposed of, "if you want to stand on your position" (R. 19). At the end of the recess, petitioner called to the stand Andrew Devoti, a public ac-

countant who testified that in 1953 his wife worked three days a week for Twin City Distributing Company; that petitioner came to his home the preceding night and asked both his wife and himself if they knew where the books of the Company were, and that they replied that they did not know; that when the Devotis were finished with the books they brought them back to the company's office. The last time he brought them back was, he believed, an evening in September 1953. (R. 19-20.)

The court then told petitioner that it would give him one further chance to comply with its order, and allowed him until two o'clock that afternoon to produce the journal and general ledger of Twin City Distributing Company. To his counsel's question "In the Grand Jury room or down here, Your Honor?", the court replied: "In the Grand Jury room, and if he does not he will be down here very soon. We will take care of him." (R. 21.)

At 3:50 P.M. that afternoon, the Grand Jury being present in the petit jury box, the court was advised that the petitioner had again appeared before the Grand Jury but had not produced the books as ordered (R. 21). At the request of government counsel the hearing "on * * * Lopiparo's defiance of the court" was deferred until the following morning (R. 22). Petitioner's counsel stated that he had witnesses present whom he wanted to return in the morning and he was instructed to arrange this with the marshal (R. 22).

On the following morning (May 21st) counsel for the government read to the court the questions

asked of appellant before the Grand Jury on the afternoon of May 20th, and his answers thereto (R. 23 to 30). Petitioner had testified that he had unsuccessfully "tried every which way to find them books"; that he had talked to Giondono, the vice-president and Caleca, the secretary-treasurer, as well as his auditor and the girl who worked in the office, all without result (R. 23, 24). He suggested that the Sheriff who had padlocked the office might have taken the files (R. 24). He said that it could have been nine to ten months since he last saw the books, and "I don't recall how long it has been because I was away on a vacation and I don't know what the exact month might have been, September, I might have come back the first of September and I did not see the books then. I do not have access to go into the files and look at these books because if I did look at them I would not know what I was looking at if I looked at them." (R. 25.)

He said that he said been arrested briefly in September 1953 and taken to headquarters, and that on release he found that the sheriff had attached the premises (R. 27, 28). He claimed the privilege as to questions asking who was in charge of the office in his absence; whether he had been in the office since the attachment; whether the books were in the office of the company after the attachment; where the books were taken, or whether they were taken from the company office after the attachment; whether he sold any of the company's equipment; and whether he took the books out of the Twin City Distributing Company (R. 26, 28, 29).

After the reading of petitioner's testimony before the Grand Jury his counsel announced that he had some witnesses present (R. 30). The court asked whether the witnesses would tell where the books were. Counsel stated that he did not know; that the Clerk of the St. Louis Circuit Court would testify to issuance of an attachment to the Sheriff, also present and ready to testify to its execution and the storing of "everything * * * out there" (R. 30, 31). At the court's suggestion counsel asked the Sheriff whether he had the books (R. 31); on returning to the front of the courtroom counsel stated that the sheriff "gave me a list of the articles that he took under this writ" (R. 32). The court stated that it was not interested in other things, that it wanted to know about those books (R. 32). When counsel mentioned an unopened safe, the court directed further consultation with the Sheriff to enable counsel to make an offer of proof, but nothing came of the conference (R. 32). Counsel then offered to prove the arrest of petitioner and others and their exclusion, on release, from the company premises (R. 33). He also offered to prove that petitioner was a gangster and a notorious underworld character, and that he had been interrogated by the Kefauver Committee investigating organized crime in interstate commerce (R. 34). Counsel stated " * * * these records, the Grand Jury has the right to have them * * *. I would like to state I am bringing out his record to show he can't take the stand because he would be waiving the Fifth Amendment, that the Grand Jury are entitled to

have them as such, but I can't show good faith on his part to comply with the order" (R. 37).

ARGUMENT

1. There is no merit to petitioner's claim that the government failed to prove that petitioner wilfully failed to produce the books of the corporation as directed by the court (Pet. 8-10). The government showed that petitioner was president and 48 percent stockholder of a three man corporation. This was not a large corporation, the president of which might have little to do with the custody of corporate records. This was a small, tightly-knit group of which petitioner was the principal stockholder. On this basis the grand jury and the court had the right to assume that he had sufficient control of the corporate records to be able to produce them, or at least to be able to know where they were. Cf. *Wilson* v. *United States,* 221 U.S. 361, 385; *Nelson* v. *United States,* 201 U.S. 92, 115. As the court stated in *Green* v. *United States,* 193 F. 2d 111 (C.A. 2):

> That a defendant trustee had so little regard for the responsibilities of his position as to know nothing whatsoever of the location of what were necessarily his own, as well as his co-trustees', official records does seem sufficiently strange as to suggest excuse, rather than fact.

See also *London Guarantee & Accident Co.* v. *Doyle & Doak,* 134 Fed. 125, 128 (C.C. E.D. Pa.) where the court said:

It cannot be doubted, I think, that the burden of proof was upon them. The court's order of June 25th necessarily implied that the books and papers were in existence, and within the defendants' reach. If they knew then that the facts were otherwise, it was their duty so to inform the court at once, and to object to the making of an order with which they must have known that they would not be able to comply. Failure thus to act at the proper time is properly followed by imposing upon them the burden of excusing their apparent disobedience to the order; and the same result follows, even if they were ignorant concerning the existence and whereabouts of the books, but did not take the trouble to ascertain in advance whether or not they could comply with such an order, and contented themselves with resisting the application upon other grounds. When a court requires the production of documents, it is presumed that these can be had; and, while the presumption is not conclusive, it has force enough to compel the party upon whom the order is made to undertake the task of showing to the court's satisfaction why the order cannot be fully complied with. If he leaves the matter in doubt or uncertainty, the presumption is not overcome, and the usual consequences of failure must be borne by the party who has failed to sustain the burden of proof.

* * *

Granted that inability to comply with the court's order would have constituted a defense, *United States* v. *Bryan*, 339 U.S. 323, mere denial of ability to produce does not discharge the duty of either producing or explaining. Petitioner offered nothing but a bare denial of ability to produce in the way of explanation for his failure to bring the books before the grand jury as ordered. The accountant whom he called as a witness had not worked for the corporation after September 1953. It is evident from the statements by counsel after he had talked with the Sheriff that counsel could not show that the books had been taken at the time the offices were padlocked. Petitioner did not even take the stand before the court to testify as to what efforts he had made to locate the books. It is true that petitioner's testimony before the grand jury was before the court, and that there petitioner had testified that he had called the other officers of the corporation to try to locate the books, but he did not produce the other officers before the court. Nor did petitioner himself offer a full explanation before the grand jury since he claimed the privilege as to all questions as to what he himself had done wth the books.

Petitioner argues that he could not take the stand to testify as to his efforts to locate the books because in so doing he would lay himself open to self-incrimination on cross-examination. Clearly, the government would have had the right to cross-examine petitioner as to matters tending to establish the truth or falsity of his claim that he had tried to but could not locate the books. Petitioner, how-

ever, cannot have the benefit of the privilege both ways. By choosing not to take the stand, he cannot overcome the force of the government's showing.

Moreover, if petitioner really had a straightforward explanation of what had happened to the books, he undoubtedly could have proved the fact without the necessity of his taking the stand. As president of the small corporation, he must have known who had them at some period, where they had been kept, when they had last been seen, why they were believed to have been destroyed, etc. No witness was produced to testify to such facts. The court was justified in concluding that petitioner's lack of showing on inability to comply reflected a decision to risk contempt punishment rather than to produce.

2. (a) Petitioner's contempt occurred in the actual presence of the court, so that his case was subject to summary disposition under Rule 42(a), F.R. Crim. P. As required by 42(a) the trial judge stated in the fifth and seventh paragraphs of his Order, that he saw and heard the conduct constituting a contempt committed in his actual presence (R. 37).

Petitioner appeared five times in all before the court, admitted failure to produce, received orders to produce and instructions that his claim of privilege was invalid, then finally returned to the court room and heard his further refusal (on the overruled claim of privilege) read from the transcript. His counsel stated for him in open court his refusal to produce or explain. Although counsel at-

tempted to justify that refusal on Fifth Amendment grounds, it remains a refusal either to produce or explain and thus an open court defiance of the court's order.

(b) Moreover, although the contempt occurred in the actual presence of the court, petitioner in point of fact received notice and hearing within the meaning of Rule 42(b). He was told, following his refusal on Tuesday to produce the books for the grand jury, to bring them with him on Wednesday morning, and to bring counsel with him. On appearance Wednesday he was taken before the court and the charge of refusal to produce was made against him in open court. On that occasion as well as on his four subsequent appearances before the judge he was represented by counsel, so that his claim of lack of notice of the consequences of refusal to produce carries no weight. Moreover, government counsel specifically urged that petitioner be jailed for criminal contempt (R. 19, 36).

The hearing that he received afforded him ample opportunity for defense. After ruling out his claim of privilege the court on May 19 gave him an opportunity to produce the books the next morning. When the court at that time was told he had not brought the books, it heard his witness Devoti who offered no explanation for non-production. The court then gave petitioner another opportunity to produce by 2 P.M. Following an appearance in court at 3:50 P.M., at which was reported his further refusal to testify before the grand jury with respect to his having taken the books from the

padlocked office, the court continued the case to the following morning. At that time his persistence in a claim of privilege appeared from the reading in court of the grand jury transcript of the previous afternoon's testimony. The court offered to hear any witness for petitioner who would give testimony as to the location of the books but petitioner offered none but irrelevant testimony. The court afforded petitioner every opportunity to consult with his lawyer, frequently interrupting the proceedings for this purpose (R. 7, 11, 31, 32). Rule 42(b) does not require "that the proceedings must take any particular form so long as the substantial rights of the accused are preserved." *Camarota* v. *United States,* 111 F. 2d 243, 246 (C.A. 3). Petitioner clearly received a hearing completely consistent with Rule 42(b) and due process requirements. *Lang* v. *United States,* 55 F. 2d 922 (C.A. 2), certiorari dismissed, 286 U.S. 523; *O'Connell* v. *United States,* 40 F. 2d 201 (C.A. 2), certiorari dismissed, 296 U.S. 667.[1]

---

[1] As a punishment for criminal contempt, the sentence was within the court's discretion. "* * * the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." *United States* v. *United Mine Workers of America,* 330 U.S. 258, 303.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1954.

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IN THE

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OCTOBER TERM, 1954.

No. 495.

[redacted]

ANTHONY LEPORATI,
Petitioner,

v.

UNITED STATES OF AMERICA.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 459.

ANTHONY LOPIPARO,
Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

(A) MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on January 10, 1955. Rehearing is sought at this

time because, as is pointed out more fully in the annexed petition, the decision of the Court of Appeals for the Second Circuit in **United States v. Patterson**, 219 F. 2d 659, filed January 27, 1955, is in conflict with that of the Court of Appeals for the Eighth Circuit in this case, and thus has created a conflict of decisions in the Courts of Appeals which should be resolved by this Court. Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58, the grounds upon which it is based arose after the denial of the writ of certiorari. Counsel learned of this conflict between circuits after the expiration of the time prescribed and the summary of this decision was not published in Law Week until after the expiration of this period. 23 L. W. 2381. The Court has power, in its discretion, to entertain the petition. **Roberts Sash & Door Company v. United States**, 282 U. S. 829; **Duquesne Steel Foundry Company v. Burnet**, 282 U. S. 830; **Douglas v. Willcuts**, 295 U. S. 722; see **Simpson & Company v. C. I. R.**, 321 U. S. 225, 229.

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(B) PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of January 10, 1955, denying the petition for writ of certiorari, and that a writ of certiorari issued to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed November 23, 1954, herein.

REASONS FOR GRANTING THE HEARING AND ISSUING THE WRIT.

1. At the time of this Court's order of January 10, 1955, there was no clear conflict of decisions of the questions sought to be reviewed. Since that time, a direct and explicit conflict has arisen. On January 27, 1955, the Court of Appeals for the Second Circuit announced its decision in **United States v. Patterson**, 219 F. 2d 659, reversing on the same issues the decision of the District Court for the Southern District of New York. (A copy of the opinion of the Court of Appeals for the Second Circuit is appended hereto.)

In the **Patterson** case, defendant, executive secretary of the Civil Rights Congress, was convicted of criminal contempt in November, 1954, for failing to produce certain of its records demanded by a Grand Jury subpoena duces tecum. He conceded that any of its records in existence were under his control. He had served a prior sentence for contempt from July through September, 1954, for refusing to produce part of the records sought. As here, defendant testified that he had no knowledge of the present location of the books, saying he had not seen the books since his imprisonment, a period of four months. Petitioner, ordered to produce corporation records in May,

1954, testified that he had not seen them since September, 1953, when he was arrested, the corporation's assets seized under an attachment and the corporation and its officers charged with an offense involving counterfeit cigarette stamps. In both cases, the Government did not introduce any independent evidence but rested its case upon a presumption of the continued possession and existence of the books even though both associations were being investigated and even though other officials might have destroyed or hidden the records. Patterson invoked the privilege against self-incrimination when asked about his books from July to November and, in the instant case, petitioner invoked the privilege when asked about the records from September to May.

The Second Circuit found no manifest disparity of proof to warrant the shifting of the burden of proof to defendant under the test set forth in **United States v. Fleischman**, 339 U. S. 349, 361, and said (219 F. 2d 662):

> "Outside of the challenged inference and temporally remote contradictory statements by the defendant, independent evidence for conviction is lacking here. More important, there is no 'manifest disparity and convenience of proof' when the defendant can extricate himself from his predicament only by opening the doors to criminal prosecution on other charges. The defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control. He cannot legally be jailed for contempt for invoking his constitutionally protective privelege not to be a witness against himself. That in effect is what has happened . . . There is thus nothing to fill the gap in the case; hence his conviction must be reversed. Healy v. United States, supra, 9 Cir., 186 F. (2d) 164, 170, 171."

Here, the court below shifted the burden of proof to petitioner and said that he did not prove he was unable to produce the records. The court also presumed that the president of a corporation has control of its records. And as noted in Judge Collet's dissent, petitioner's invoking of the privilege against self-incrimination was also used to infer that he could produce the records and to infer that his defense lacked good faith.

We wish to advise the Court that petitioner has sought collateral relief from his conviction by a motion to vacate or correct the sentence under 28 U. S. C., § 2255, and in the alternative by petition for writ of habeas corpus. Petitioner contends in the collateral proceedings that the sentence which provided for imprisonment for 18 months or until the further order of the Court should petitioner produce the records before the expiration of said sentence or the discharge of the Grand Jury is equivocal and that it, therefore, does not authorize imprisonment after the discharge of the Grand Jury in January, 1955. Petitioner is also there urging that the Court of Appeals affirmed the case as a civil rather than a criminal proceeding. The Government opposes both these contentions and the District Court has rejected petitioner's arguments. The collateral case was argued on its merits before the Court of Appeals on May 6, 1955, after the Court of Appeals had denied bail.

2. The Court's concern with the uniform administration of criminal justice in the various circuits warrants a resolution of this conflict. The issue may arise not only when documents are sought by governmental agencies but also in civil proceedings. The question presented is of importance in determining the burden of proof and applicable presumptions in cases where a witness fails to produce records which are not privileged.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Sidney M. Glazer,
Counsel for Petitioner.

APPENDIX.

Conflicting Opinion.

United States Court of Appeals,
Second Circuit.

United States of America,
Plaintiff-Appellee,

v.

William L. Patterson,
Defendant-Appellant.

No. 186, Docket 23389.

Argued Jan. 12, 1955.

Decided Jan. 27, 1955.

Dissenting Opinion Jan. 31, 1955.

Richard Owen, Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., New York City, on the brief), for plaintiff-appellee.

Milton H. Friedman, New York City, for defendant-appellant.

Before Clark, Chief Judge, and Frank and Hincks, Circuit Judges.

Clark, Chief Judge.

Defendant, William L. Patterson, has been convicted of criminal contempt for his failure to produce certain rec-

ords demanded by a subpoena duces tecum issued by a duly authorized grand jury. The defendant concedes that any records of the Civil Rights Congress which presently exist are in his control as Executive Secretary of that organization. His main contention, also advanced below, but rejected by the district court, is that the government has not sustained its burden of proof that the records it demands are still in existence.

The present proceedings arise out of an investigation initiated by the Internal Revenue Department last spring to audit the books of the Civil Rights Congress. At that time Patterson had prepared detailed statements of 1953 income from the 1953 receipt books, but refused to submit the receipt books themselves which contained the names of contributors. This refusal, which concerned at that time only the 1950, 1951, and 1952 books, led to a ninety-day sentence for criminal contempt by Judge McGohey in June. Matter of Tax Liability of Civil Rights Congress for the years 1950, 1951 and 1952, D. C. S. D. N. Y., 124 F. Supp. 68. This sentence was served from July 1 to September 28, 1954. Immediately after release from prison, defendant was again asked for the receipt books, this time including the 1953 ones, by an Internal Revenue agent. Upon noncompliance the matter was referred to a grand jury for investigation of possible violation of I. R. C., § 145 (a), 26 U. S. C., § 145 (a), which provides penalties for failure to file tax returns, keep books, or supply information for federal tax purposes. Pursuant to a grand jury subpoena dated October 28, 1954, testimony was taken on November 5, 9, and 16, 1954. At that time the defendant testified that he had not had possession of the documents since July 1, 1954; and other witnesses attested to destruction of earlier records in April or May of this same year. Judge Weinfeld on November 16 directed production of the 1952 and 1953 records and imposed a contempt sentence on November 19 when they were not produced.

Application of Patterson, D. C. S. D. N. Y., 125 F. Supp. 881.

[1] The law of criminal contempt is clear that no individual may refuse to surrender existing documents of a corporation or association if they be within his control. United States v. Fleischman, 339 U. S. 349, 70 S. Ct. 739, 94 L. Ed. 906; United States v. White, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, 152 A. L. R. 1202; Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D 558; United States v. Field, 2 Cir., 193 F. 2d 92, certiorari denied 342 U. S. 894, 72 S. Ct. 202, 96 L. Ed. 670, certiorari dismissed 342 U. S. 908, 72 S. Ct. 303, 96 L. Ed. 679.[1] There was sufficient evidence to support the finding of the trial judge that the receipt books for 1952 and 1953 were still in existence in June, 1954, when the statements based upon them were produced for agents of the Bureau of Internal Revenue. From this, and from the fact that the defendant had made contradictory statements about the whereabouts and existence of the records in June, Judge Weinfeld concluded that the government had made out a prima facie case for October, 1954, when the subpoena issued, and November, 1954, when the alleged contempt occurred. And going on this assumption, he held that the defendant had not met the burden thus thrust upon him by testifying: "I have no knowledge of the whereabouts of the books called for, nor whether they are in existence. * * * I have not seen those books since July." Judge Weinfeld then sentenced the defendant for con-

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[1] The last case cited, together with United States v. Field, 2 Cir., 193 F. 2d 109, and Green v. United States, 2 Cir., 193 F. 2d 111, are all affirmances of convictions for contempt for failing to produce records of the Civil Rights Congress, though not touching the issue here crucial of their continued existence. See also United States v. Patterson, 92 U. S. App. D. C. 222, 206 F. 2d 433, affirming dismissal of an indictment against this defendant for failure to produce such records in response to a Senate committee subpoena on the ground of lack of jurisdiction in the committee.

tempt, despite the fact that he held that the defendant had been justified in invoking the privilege against self-incrimination when asked about the whereabouts of the books from July to November.[2] Legal basis for resort to the privilege was found in the fact that testimony as to destruction of the records might lead to prosecution for violation of I. R. C., § 145 (b), and evasion of the tax or for perjury with regard to a prior affidavit, made in June, 1954, denying knowledge of the whereabouts of the records at that time.

[2] The decision below thus rested primarily on a presumption of continued possession and existence held sufficient to constitute a prima facie case for the government. Neither the existing precedents nor the facts of this case warrant such a drastic shifting of the burden of proof in a criminal case. As the Supreme Court said in Maggio v. Zeitz, 333 U. S. 56, 65, 68 S. Ct. 401, 406, 92 L. Ed. 476:

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[2] The defendant invoked the Fifth Amendment on several different occasions:

"Q. Mr. Patterson, where are the books that are called for by Grand Jury Exhibit 1?

[After direction to answer]

"The Witness: I must decline to answer on the grounds anything that I might say might tend to incriminate me.

"Juror: How will it tend to incriminate you?

"The Witness: Not because anything in the books themselves are incriminating, but that it creates the impression that I have personally, or through direction, either destroyed or made the books inaccessible. That would, of course, tend to incriminate me."

"Q. Mr. Patterson, are the books called for by Grand Jury Exhibit 1 of today's date, the subpoena, in the possession of any head of any of your chapters?

[After direction to answer]

"Witness: I must decline on the ground that anything that I might say might tend to incriminate me. I would just like to also say this to the Grand Jury, that such a question implies that I did away with the books, and I want clearly to have such a question not placed on the record which would tend to put me in a position of perjury."

"Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalization, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason. • • • Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a 'presumption of fact,' is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved." The presumption is thus no more than a common-sense inference, as strong or as weak as the nature of the surrounding circumstances permits. Brune v. Fraidin, 4 Cir., 149 F. 2d 325. That also has been the established rule in this circuit. In the two cases where we have upheld a factual inference of present from past possession, the time period so spanned was short, and outside motivation for destruction of the particular records there involved was lacking. United States v. Goldstein, 2 Cir., 105 F. 2d 150; In re Arctic Leather Garment Co., 2 Cir., 89 F. 2d 871.

Here, in contrast, several significant facts make continued existence and possession of the 1952 and 1953 records on the whole unlikely. Patterson's own possession was undeniably interrupted by his jail sentence from July to September. During that time other officials of the Civil Rights Congress might well have taken it upon themselves to do away with these records. The very existence of these records had already once sent their Executive Secretary (and others) to jail. Furthermore, the Civil Rights Congress was being investigated by the New York Legislative Committee to Investigate Charitable Agencies and Philanthropic Organizations; and a hearing before the

federal Subversive Activities Control Board concerning listing as a Communist-front organization was pending. In the light of all this hostile official scrutiny it would have been natural for the officers of the Civil Rights Congress to have thought it advisable to destroy records which might lead to identification and exposure of their contributors. There is nothing to show that, given this motivation, these officers could not have destroyed these records, since they were never in the exclusive physical custody of Patterson, even when he was not in jail. See Healey v. United States, 9 Cir., 186 F. 2d 164.

[3-8] The government contends that an impossible burden will be placed on it if in cases like this it must introduce positive proof of continued existence. While it is true that the prosecution need not negative every self-exculpatory suggestion of a recalcitrant witness, it cannot completely sidestep its burden of proving guilt beyond a reasonable doubt. The tests recently reiterated in United States v. Fleischman, 339 U. S. 349, 361, 70 S. Ct. 739, 745, 94 L. Ed. 906, emphasize that before the burden of proof may be shifted, the government's case must be independently established to some extent, and there must be a "manifest disparity in convenience of proof and opportunity for knowledge." Outside of the challenged inference and temporally remote contradictory statements by the defendant,[3] independent evidence for conviction is lacking here. More important, there is no "manifest disparity in convenience of proof" when the defendant can extricate himself from his predicament only by opening the door to criminal prosecution on other charges. The

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[3] Since the defendant was undoubtedly correct in denying physical custody of the records from July 1 on, when he was in jail, his prior inconsistent statements about their whereabouts before July 1 lose their probative force. They may have been relevant to his first conviction for contempt in June, but can hardly be said to carry over in substitution for proof of guilt in this case.

defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control. He cannot legally be jailed for contempt for invoking his constitutionally protected privilege not to be a witness against himself. But that in effect is what has happened. The result is the more strange, since court and counsel below respected his privilege and did not press him further or beyond the point stated. There is thus nothing to fill the gap in the proof; hence his conviction must be reversed. Healey v. United States, supra, 9 Cir., 186 F. 2d 164, 170, 171. We therefore remand the proceeding for his release.[4] This should be effected at once in order that the case cannot become moot. See Patterson v. United States, 75 S. Ct. 256, per Acting Circuit Justice Frankfurter.

The judgment is reversed and the proceeding is remanded for the immediate discharge of the defendant from custody. The mandate of this court will issue at once.

Hincks, Circuit Judge (dissenting).

As the majority opinion discloses, "There was sufficient evidence to support the finding of the trial judge that the receipt books for 1952 and 1953 were still in existence in June, 1954." The evidence also showed that these receipt books were indeed "books" as distinguished from loose papers; that each of them contained records of transactions extending at least over several months; that it had

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[4] The defendant's further contention that he was not afforded notice and a fair hearing as guaranteed by Fed. Rules Crim. Proc., rule 42 (b), we find without substance. He was always represented by counsel, with every opportunity to cross-examine witnesses. Significantly he never requested further hearings or extensions of time to prepare his defense. United States v. Bryan, 339 U. S. 323, 70 S. Ct. 724, 94 L. Ed. 884; Lang v. United States, 2 Cir., 55 F. 2d 922, certiorari dismissed 286 U. S. 523, 52 S. Ct. 495, 76 L. Ed. 1267.

been the practice of the Civil Rights Congress (CRC) to preserve such books for a period of years; and that these particular books had not been destroyed when inspection thereof was first demanded by an Internal Revenue Agent in April, 1954, but on the contrary were still in existence in June—several weeks after a subpoena had actually issued on May 12, 1954, calling for the production of the 1950-1952 reecipt books.

Defendant's own testimony of May 27, 1954, showed that as Executive Secretary and national head of the CRC he, and no other official or individual, had authority to produce the records. In November he testified that he had been head of CRC from April, 1948, continuously to date, including the 90-day period of his jail term which had terminated on September 28, 1954; that he had responsibility for the books and records; that "there is not an available record in my office which would not be produced at my request"; and that the heads or secretaries of CRC chapters "have a responsibility to carry out my directives."

In April, 1954, a revenue agent in the course of an audit of the CRC books demanded to see its receipt books for 1950-1952 and was told by the CRC bookkeeper that the bocks were available but that she would never give them to him or that he would never see them. On June 17, 1954, the defendant filed an affidavit in opposition to a contempt citation in which he swore that he then believed that the books for 1950-1952 had been contained in cartons which had been destroyed while in storage. But the government produced credible evidence that the cartons thus referred to had been destroyed in April, 1954; yet, as noted above, the books for 1952 and 1953 were still in existence in June, 1954.

The defendant himself throughout took the position that the government had no right through inspection or production to see the receipt books. On October 22, 1954,

when he appeared before the Grand Jury in response to its subpoena, he testified that the books called for "were not possessed by us or available to us in June, last June." As to this, his counsel now concedes by brief "that there was evidence from which the court might logically infer that the duplicate receipt book for the year 1953 was in existence in June. * * * and that there was further evidence (although inadequate in the opinion of the writer—i. e., appellant's counsel—) from which the court below might have inferred that the 1952 records as well as the 1953 records existed in June, 1954." He then proceeded to testify that the records "are not available now." He gave as further reasons for noncompliance an assertion that the subpoena was part of a national "witch hunt" against progressive organizations not in pursuit of any legitimate government function and, lastly, that the Internal Revenue Service had no valid interest in the CRC because CRC was exempt from taxation under the Internal Revenue Code as a civil league. As to the receipt books, he testified, "We do not have them, I do not know who possesses them if they exist—they are not available and in so far as my knowledge is concerned are not in existence." And when asked what steps he had taken to locate the records since September 28, 1954 (when he had completed his prior sentence for contempt) he testified that "on advice of counsel, I myself made a most extensive search of every one of the five rooms in which our offices are located although that had been done by me before and had been stated in the previous record that they were not available." It is perhaps worth adding that there was no evidence of threat, direct or implicit, to destroy the records and no evidence that the defendant made other effort to obtain the records other than that just above quoted from his testimony.

In view of the defendant's continued control of all records of CRC and the demonstrated and conceded existence

of the particular records in June, I think Judge Weinfeld's finding that the records were still in existence in November and hence within the defendant's control was a reasonable common sense inference of ample strength to support the conviction. Certainly the Judge was not bound to believe the defendant's uncorroborated assertion in October that the records were not available, especially in view of the fact that that assertion when earlier made had concededly been proved false. The inference was weakened not at all by the fact of the defendant's term in jail from July 1 to September 28, 1954. To be sure he was then not in possession of the records. But so far as the evidence goes he had never been in possession. Control of the records was the basis of the decision. In the setting of this case, the records could have been removed from the defendant's control only by their destruction. And the failure of the government to produce evidence to negative destruction did not in my judgment make it unreasonable to infer from the existence of the records in June that they were still in existence in November in view of the nature of the records and the practice of CRC in preserving its records as stated above.

The majority opinion suggests that in the situation which existed after the defendant went to jail in July, the records demanded might have been destroyed by other officers of CRC motivated by desire to put them beyond reach of governmental scrutiny. But that objective could be as well achieved by secreting the records—a method which had been successfully sampled in May—as by their destruction. Moreover, in the circumstances here the deliberate destruction of the records would have been an illegal act giving rise to serious sanctions.[1] That factor made

[1] This obviously is not a case relating to a record innocently lost or misplaced. In May its importance had been so emphasized that its inadvertent loss or destruction thereafter is a possibility which exceeds the bounds of rational hypothesis.

the bare possibility of destruction even more remote and too conjectural, in my judgment, to affect the inference otherwise permissible of the continued existence of the records. If, as my colleagues suggest, it would be "natural" for CRC officials to destroy records merely to prevent the disclosure of the names of its contributors, it would be at least equally natural to suppose that the hazard of criminal sanctions would prevent action to destroy a record not incriminative of anyone.

Moreover, the persistent attitude of non-compliance and defiance on the part of Patterson and other employees of CRC beginning at least as early as April, 1954, were additional factors which made it unnecessary for the government to negative the possibility of destruction under the doctrine of United States v. Fleischman, 339 U. S. 349, on page 360, 70 S. Ct. 739, on page 745, 94 L. Ed. 906, where the court posed this question:

> "It may be argued, however, that respondent may have adopted the position of the other members of the board only after she had tried in good faith to bring about compliance with the subpoena. Or perhaps she had been ill or necessarily out of town immediately prior to April 4. Granting that these or other excuses for nonaction may exist, must the Government negative each, or was the burden on respondent to advance them as defensive matter?"

It was held that the burden of going further rested on the defendant. Here the excuse given was that the records sought were unavailable. There is fully as much reason here as in Fleischman to accept the government's proofs as sufficient in the absence of credible rebuttal by the defendant.

The majority quotes from Maggio v. Zeitz, 333 U. S. 56, 68 S. Ct. 401, 92 L. Ed. 476, which is the leading modern judicial decision on turnover orders in bankruptcy. I think

that case supports the conviction here. On page 66, of 333 U. S., on page 406 of 68 S. Ct., it was stated "The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand." See note 1. And in Maggio the contempt conviction was reversed primarily because the courts below had misconceived the law. I do not read the case as even suggesting that a finding of continued existence of controversial records such as was made in the setting of the case, was unreasonable or invalid. Certainly Judge Weinfeld's opinion disclosed no misconception of the applicable law. Here the majority judges, unlike the judges of this court who sat on the Maggio appeal, In re Luma Camera Service, Inc., 2 Cir., 157 F. 2d 951, 955, do not go so far as to say "we **know** that Maggio (who for purposes of this case is Patterson) cannot comply". They say only that greater proof of ability should have been made by the government. With the Maggio decision before him, the learned editor of Collier on Bankruptcy, Col. 2, par. 23.10 (2), states: "After the trustee has introduced some evidence that the goods were once, or are presently, in the possession or control of the defendant, the burden of **going forward to explain** is then on the defendant * * *. Mere silence, of course, is not enough. A sworn denial of possession or control is not enough." (cases cited) I think that doctrine is applicable at least to the facts of this case.

The majority opinion in part seems to rest on the notion that the defendant's conviction was the result of his invoking the Fifth Amendment. As to this, Judge Weinfeld made it plain in his opinion that his finding of ability to comply rested not at all on unfavorable inference from Patterson's refusal to answer questions. And the defendant was not jailed for refusing to answer questions. He

was jailed only for refusing to produce documents found to be within his control upon evidence sufficient without inference deriving from the invocation of the Fifth Amendment.

The majority opinion seems to assume wholly without evidence that when the government's proofs had been concluded the defendant may have had an effective rebuttal on the issue of continued existence which he could not present without incriminating himself or his subordinates with respect to other possible charges, as, for instance, that the books had been destroyed by his or their deliberate act. And it is indeed a possibility that Patterson was in this dilemma. But certainly Patterson had no right, constitutional or otherwise, to spare his subordinates from incrimination. Nor was he personally entitled to the benefit of a rebuttal which he had full opportunity to present but elected not to present. To hold otherwise is in effect to make the Fifth Amendment a substantive defense to a criminal charge supported by sufficient evidence. Surely a defendant who stood mute throughout trial cannot upset his conviction on a charge supported by adequate evidence by suggesting that at the time of the offense charged there was a possibility that he was engaged, say, in a burglary elsewhere—an alibi which he could not prove without self-incrimination. In my analysis, no real question under the Fifth Amendment is involved in this case. Silence may be golden. But the Fifth Amendment is not a formula for alchemy.

It is true that the inference which we sanctioned in United States v. Goldstein, 2 Cir., 105 F. 2d 150, happened to be one of continuing existence for only 11 days, and in In re Arctic Leather Garment Co., 2 Cir., 89 F. 2d 871, was only six weeks. The fact that here the critical interval was some four months does not make the principle of these decisions inapplicable to records too important to be

mislaid and too permanent to evaporate. The suggestion in the majority opinion that the length of the interval depends upon an absence of incentive to destroy, if carried to its logical conclusion would mean that the admitted existence of records yesterday would not support an inference of their existence today. For records such as these could be destroyed in but an hour.

Indeed, the effect of the majority holding is to sap the vitality of compulsory disclosure not only when invoked by duly constituted governmental agencies acting in the proper discharge of their legitimate functions but also in civil proceedings. Under such doctrine, it would appear, a corporate executive can refuse to disclose documents concededly having recent existence and, by standing mute, make it impossible to prove in ensuing contempt proceedings that his conduct was contemptuous. Generally, the objective of compulsory disclosure is to obtain material which it is to the interest of the witness to withhold. That mere incentive to destroy kills the inference of continued existence, I think unfortunate doctrine. Cf. United States v. Fleischman, supra.

I would affirm on the well-reasoned opinion of the able and experienced trial judge.